BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Court of Claims is reported at 48 F. Supp. 647 (R. 18). The petitioners' motion for a new trial was overruled on May 3, 1943, and appears at R. 23.

Jurisdiction.

The judgment of the Court of Claims now sought to be reviewed was entered on February 1, 1943. Petitioners' seasonable motion for a new trial was overruled May 3, 1943.

The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939 (28 U. S. C. A. Sec. 288).

Statement of the Case.

Lawrence M. Williams is Liquidator of Sterling Sugars, Inc., formerly a Louisiana corporation that was succeeded in 1937 by a Delaware corporation of the same name, and the Sterling Sugars Sales Corp. was a selling corporation, first as a subsidiary of the Louisiana corporation and then as a subsidiary of the Delaware Corporation. The Sales corporation sold only the products of its parent corporation. The taxpayer was the Louisiana corporation.

The Louisiana corporation operated plantations in the State of Louisiana for the production of sugarcane, purchased sugarcane and raw sugar, operated a sugarcane factory and a sugar refinery. All of its production was marketed through the sales corporation in the Mississippi Valley territory (R. 15). Sugar is purchased, sold, and shipped in one hundred pound bags and the unit hereinafter referred to is a unit of 100 pounds.

On September 24, 1933, a floor stocks tax was imposed on cotton bags, but that tax is not in controversy as the Court below has awarded judgment to the Louisiana corporation for the full amount of the tax paid on cotton bags, that is $3,101.14 (R. 23).

On June 8, 1934, a floor stocks tax of the equivalent of 53½ cents per hundred pounds was imposed on refined sugar, held for sale as direct-consumption sugar, and the Louisiana corporation paid to the defendant $78,682.45 (R. 10), as tax on 147,070 one-hunderd pound units of refined sugar (R. 10).

This Court in *United States* v. *Butler* (297 U. S. 1) invalidated the tax and Congress in the Revenue Act of 1936, Section 902 (49 Stat. 1747), required that the taxpayer, in order to procure a refund, must establish that it bore the burden of the tax.

The 147,070 one hundred pound units of sugar that the Louisiana corporation had on hand on the taxing date cost $574,131.23, on which it paid a tax of $78,682.45, making a total of $652,813.68, or $4.43880 per unit. The amount realized on sale was $625,702.70, or $4.25446 per unit, which is $27,110.98, or $0.18434 per unit, less than the cost of production and the tax (R. 24). These facts were stipulated by Counsel for the parties and found as a fact by the Commissioner of the Court of Claims who reported to the Court. The Court deleted the finding of the Commissioner from its findings of fact, even though the sole objection to the Commissioner's finding by the Defendant was directed to the materiality and relevancy of the finding (R. 25).

The price of sugar fluctuates. Early in 1933 excess stocks exercised a depressing effect on the market price (R. 16). The market price in January, 1933, was $4.10 (R. 18). The various producing areas endeavored, with the sponsorship of the Department of Agriculture, to negotiate a stabiliza-

tion agreement intended to limit supplies to a point where prices could be held up (R. 16). During these negotiations prices advanced substantially (R. 16), reaching $4.70 in mid-September, 1933 (R. 16). At that time the Secretary of Agriculture declined to approve the agreement and prices started to decline (R. 16). By December, 1933, the price had dropped to $4.30 (R. 16), and on February 11, 1934, three days after the President sent a message to Congress recommending that sugar be made a basic agricultural commodity, the price advanced to $4.50 (R. 17). The President in his message said that "consumers need not and should not bear the tax" (R. 17). Between April 18, 1934, and June 7, 1934 (the day before the tax became effective), prices declined from $4.50 to $4.00 (R. 17). During the 30-day period before June 7, 1934, there was a natural effort to move stocks of sugar into the hands of retailers and customers (R. 17). A 30-day stock of sugar in retailers' hands was exempt from tax and all sugar in the hands of consumers was exempt from tax (Agricultural Adjustment Act Sec. 16(b), 48 Stat. 40). On June 8, 1934, the quoted price of sugar advanced 55 cents (R. 18).

The Louisiana corporation's marketing territory was definitely limited to the Mississippi Valley (R. 15). It sold its sugar at a discount of 10 cents below standard brands of its competitors (R. 15), in an open competitive market at prevailing prices, less the 10 cent discount (R. 15). It produced about one-half of one percent of the sugar consumed in the United States (R. 15). It guaranteed its customers against all price declines, whether of its own or competitors (R. 15). Neither the Sales corporation nor the Louisiana corporation acting through the Sales corporation billed the floor stocks tax as a separate item (R. 15), or otherwise. It maintained large stocks of sugar for long periods of time at Memphis, Tennessee; Louis-

ville, Kentucky; Lexington, Kentucky; Portsmouth, Ohio, and other places (R. 15).

The realization on the sale of the specific sugar on which the floor stocks tax was paid is as follows (Stipulation, R. 23, 24, Pet. Ex. 11):

	Total	Per Unit
Cash Received	$687,446.27	$4.67428
Less: Items included in cash received:		
Freight recovered	30,574.64	0.20789
Premium on small sizes	5,669.94	0.03855
Warehousing & Handling Charges	15,864.27	0.10787
Total	52,108.85	0.35431
Basic Cash Received	635,337.42	4.31997
Less: Brokerage paid	9,634.72	0.06551
Net Amount of Cash Realized	$625,702.70	$4.25446

Specification of Errors.

1. The Court of Claims erred in failing to find that the Louisiana Corporation realized on the sale of the sugar $27,110.98 less than the cost of production and the tax.

2. The Court of Claims erred in rendering a judgment not sustained by the findings of evidentiary or primary facts.

3. The Court of Claims erred in failing to find as an ultimate finding of fact that the special findings of fact it did make establish that the Louisiana corporation bore the entire burden of the tax.

Summary of Argument.

A. The failure to realize cost plus tax on the sale of the product is a material issue and when such a state of facts is stipulated and undisputed, it requires an ultimate finding

of fact and judgment to the extent of the deficiency, that is $27,110.98.

B. The findings of fact that the Court did make establish the fact that both the quoted market price after the taxing date and the amount realized were no more than the price before the tax date, when due consideration is given to the decline in price in anticipation of the tax.

C. That the findings of fact the Court did make establish the fact that the factors determining the price of sugar, are many and varied, episodic in nature, and contradict any real relationship between tax and price changes.

D. A change in price which would have occurred, tax or no tax, cannot be said to reflect a tax shift, as such profit is one the plaintiff would have enjoyed quite as certainly if there never had been any tax.

E. That the findings of fact made by the Court establish the ultimate fact that the Louisiana corporation bore the entire burden of the tax and a judgment to the contrary in point of law is not sustainable.

ARGUMENT.

A. The failure to realize cost plus tax on the sale of the product is a material issue and when such a state of facts is stipulated and undisputed requires an ultimate finding of fact and judgment to the extent of the deficiency, that is $27,110.98.

The facts are undisputed. Counsel, at the hearing before the Commissioner of the Court of Claims, stipulated that the Louisiana corporation realized $27,110.98 less than the cost of production and tax (R. 23, 24, Pet. Ex. 11). The Commissioner in reporting to the Court made a finding in accordance therewith (R. 25). The defendant's only ob-

jection to the finding was on the grounds of relevancy and materiality (R. 25).

The Court in making its Special Findings of Fact omitted the finding of the Commissioner, without disclosing a reason for the omission.

That the failure to realize cost plus tax is a material issue has since been recognized by the same Court in *Insular Sugar Refining Corporation* v. *United States* (49 F. Supp. 319), in no uncertain terms. It not only advances the premise as a material issue and denies relief for failure to prove such fact, but cites the Sixth Circuit Court of Appeals in two cases to the same effect (*United States* v. *Will T. Cheek*, 126 F. (2d) 1; and *Colonial Milling Co.* v. *Commissioner of Internal Revenue*, 132 F. (2d) 505).

The Court of Claims, in discussing this issue and the proof in the *Insular Sugar Refining Corporation* (*supra*) case, said at page 323:

> "It falls short of a showing that the plaintiff did not recover its cost plus tax, which the Circuit Court of Appeals for the Sixth Circuit has held was sufficient to show it had borne the burden.
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> * * * * * * *
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> "Unless it shows at least that *it has not recovered its costs plus tax*, it has not sufficiently carried the burden of showing that it itself paid the tax and did not pass it on to its customers.
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> "We are of opinion that, in line with the above cited decisions of the Circuit Court of Appeals for the 6th Circuit in the Cheek and Colonial Milling Company cases, plaintiff must go this far, at least," (Italics supplied.)

Following the decision in *Insular Sugars* (*supra*), the petitioners made a motion for a new trial, showing therein

the application of the *Insular* rationale, but such motion was overruled (R. 23).

A review of the action of the Court below by this Court is sought on two grounds—first, the failure to make a finding of fact on a material issue; and secondly, the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

B. The findings of fact that the court did make establish the fact that both the quoted market price after the taxing date, and the amount realized, were no more than the price before the tax date, when due consideration is given to the decline in price in anticipation of the tax.

This Court in *Anniston Mfg. Co.* v. *Davis* (301 U. S. 337), held that Section 902 of the Revenue Act of 1936 did not, on its face, require conditions impossible of proof.

Section 902 reads (49 Stat. 1747):

> "No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—
>
> "(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a

tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

"(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever."

The United States in the *Anniston* case (*supra*) in urging the view this Court adopted stated in its brief (page 138):

"Generally, a simple comparison of the sales price before and after the imposition of the tax should be sufficient. The taxes were imposed on goods held ready for sale, and change or lack of change in the price on these goods would ordinarily be conclusive as to tax shifting or absorption."

The application of that premise requires a judgment for the plaintiffs in the full amount of tax paid.

The Court below found as a fact that in mid-September, 1933, the price was $4.70 (R. 16); that on rejection of the stabilization agreement by the Secretary of Agriculture the price declined to $4.30 (R. 16); that on the call for legislation to accomplish stabilization the price advanced to $4.50 (R. 17); that in anticipation of the tax the price declined to $4.00 (R. 17); that on the imposition of the tax the price advanced 55 cents (R. 18), resulting in a price of $4.55.

The tax amounted to 53½ cents. How is it possible to deduce a price rise from the foregoing findings? At best

it can be said that the tax was discounted during the period of declining price, and, with the removal of the uncertainty, the price returned to its former level.

As far as the plaintiffs are concerned, their realization was only $4.25446 ($625,702.70 divided by 147,070) (R. 24) instead of $4.50, the April 18, 1934 price (R. 17), less 10 cents, less 2%, or $4.3120.

So that, by either method of computation, the price after the taxing date was less than the price before the market began discounting the tax.

C. The findings of fact the court did make establish the fact that the factors determining the price of sugar are many and varied, episodic in nature, and contradict any real relationship between tax and price changes.

The Court below has found the plaintiffs' marketing territory was definitely limited to the Mississippi Valley (R. 15); that it maintained large stocks of sugar at warehouses in Kentucky, Tennessee, and Ohio (R. 15). The plaintiffs therefore operated in the same territory as did the defendant in *United States* v. *Cheek* (*supra*) and the Sixth Circuit in that case found (page 3):

> "The trial court found that appellee sold his sugar in a highly competitive market, where the factors and elements affecting the market price were many and varied, and impossible to determine; and that appellee had borne the burden of the tax, and had not shifted it, directly or indirectly."

The Circuit Court affirmed the trial court, stating:

> "Where the evidence contradicts any real relationship between tax and price increases, that is, indicates that the floor stock tax was never, in any sense, a factor in determining the sales price of the various articles, the burden of the statute has been adequately met."

Not only has the Court below, in the case at bar, found that the Louisiana corporation operated in the territory made the subject of decision, but it has made findings of fact that show the price to be episodic in nature, the factors many and varied, and unrelated to the tax. The Court finds that prices were determined by a number of factors (R. 18)—excess stocks of sugar (R. 18); negotiations to reach a stabilization agreement (R. 18); the disapproval of such agreement (R. 18); the President's message (R. 17); the natural effort to move stocks in the 30 days before the tax date (R. 17), and the fact that prices after the tax were no higher than they were from February 11, 1934 to April 18, 1934 (R. 17), clearly establishes that there is no relationship between tax and price changes.

D. A change in price which would have occurred, tax or no tax, cannot be said to reflect a tax shift, as such profit is one the plaintiffs would have enjoyed quite as certainly if there never had been any tax.

So, in substance, says the Second Circuit Court of Appeals in *E. Regensburg & Sons* v. *Helvering* (130 F. (2d) 507, at 510), speaking of reduction in cost:

> "A fall in the price of the raw material which would have occurred, tax or no tax, is not such an indemnity; the claimant's loss through the tax cannot be said to have been made good by a profit which he would have enjoyed quite as certainly, if there never had been any tax. Indeed, to so construe the act would expose it to some of those constitutional dangers which the opinion in Anniston Manufacturing Co. v. Davis, 301 U. S. 337, 57 S. Ct. 816, 81 L. Ed. 143, was at pains to show that it must avoid."

and speaking of sales price the Court said:

> "• • • when the increase in 'gross sales value' is not owing to the claimant's raising his selling price,

> but to some economy in manufacture disconnected with the tax, or an accident over which he has no control, there is no reason to deny him the same right to count it in absorbing the spread between 'margins'; which he has as to a decrease in the cost of the commodity."

The findings of fact made by the Court below and hereinabove summarized clearly show that excepting for the decline during the period immediately before the tax in a natural effort to move stocks, the Louisiana corporation would have received the same price for its sugar that it did receive after paying the tax.

E. The findings of facts made by the court establish the ultimate fact that the Louisiana Corporation bore the entire burden of the tax and a judgment to the contrary in point of law is not sustainable.

The findings of fact made by the Court below require an ultimate finding that the Louisiana corporation has established that it bore the entire burden of the tax; and the judgment to the contrary is not sustainable in point of law.

Conclusion.

It is submitted that it is appropriate for this Court to decide what constitutes proof of bearing the burden of the tax; that the instant case involves facts and circumstances peculiarly fitting to such purpose, and that the writ should issue as prayed.

Respectfully submitted,

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